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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 473

EDWARD YELLIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

RABINOWITZ & BOUDIN
25 Broad Street
New York 4, N. Y.

WECHSLER & DREYFUS
504 Broadway
Gary, Indiana

Attorneys for Petitioner

VICTOR RABINOWITZ
LEONARD B. BOUDIN
Of Counsel

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The District Court for the Northern District of Indiana rendered no opinion. The opinion of the Court of Appeals is reported at 287 F. 2d 292.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1961. A petition for certiorari was granted on October 9, 1961 (R. 299). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Petitioner was convicted of contempt under 2 U.S.C. 192, and was fined and sentenced to one year's imprisonment for refusing to answer certain questions at a hearing of a subcommittee of the House Committee on Un-American Activities (hereinafter referred to as the Committee). The questions presented are:

1. Did the public interest in securing answers to the questions which were the subject of the indictment outweigh the petitioner's rights under the First Amendment and the public interest in the protection of the free exchange of ideas?

2. Did the trial court err in excluding the proffered expert testimony of Professor Thomas I. Emerson, offered on the issue of the balancing of public rights and private interests?

3. Did the Committee violate its Rules in refusing to question petitioner in executive session or to consider his request that he be heard in executive session?

4. Was the statute under which petitioner was convicted unconstitutionally vague?

5. Were the questions which formed the basis of counts 2 and 4 too vague to support a valid indictment?

6. In the circumstances here shown, was there any proper legislative purpose in issuing a subpoena to petitioner?

7. Was the investigation carried on by the Committee in violation of the Constitution and particularly of the First Amendment thereof?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution of the United States.

The statute involved is 2 U.S.C., Sec. 192, which reads as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Rule XI(m) of the House of Representatives reads as follows:

> "If the Committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—
>
> (1) receive such evidence or testimony in executive session;
>
> (2) afford such person an opportunity voluntarily to appear as a witness; and
>
> (3) receive and dispose of requests from such person to subpoena additional witnesses."

Rule IV-A of the Rules of the Committee on Un-American Activities reads as follows:

"Executive and Public Hearings

If a majority of the Committee or Subcommittee, duly appointed as provided by the rules of the House of Representatives, believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing."

Rule XI of the Rules of the Committee on Un-American Activities reads, as far as relevant, as follows:

"RULE XI

"Power and Duties of Committees

(1) All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively * * *

Committee on Un-American Activities.

(a) Un-American activities.

(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American

propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Statement

Petitioner was indicted in the Northern District of Indiana, under 2 U.S.C. Sec. 192, on five counts. One count was dismissed before trial (R. 11). Petitioner waived a jury and after trial was convicted and sentenced to one year imprisonment and a fine of $250 (R. 118).

Petitioner was subpoenaed to appear before the Committee in Gary, Indiana on February 10, 1958. On February 6, 1958, counsel for petitioner sent a telegram addressed to Frank S. Tavenner, counsel for the Committee, reading as follows:

> "Undersigned represents Edward Yellin and Nicholas Busic. On their behalf I request executive session in lieu of open session. Testimony needed for legislative purposes can be secured in executive session without exposing witnesses to publicity" (R. 37, 284a).

On the same day he received a response from Richard Arens, Staff Director of the Committee, denying the request (R. 37, 286a).

On February 10, 1958, petitioner appeared before the Committee pursuant to the subpoena. Before he was sworn, Congressman Walter, presiding, read a resolution describing the purposes of the hearings. One John Lautner was then called as a witness (Gov't Ex. 15, R. 156-172). Petitioner was called as the second witness.

At the outset, counsel for petitioner sought to introduce into the record the exchange of telegrams above referred to. The following colloquy took place:

> "Mr. Rabinowitz: Mr. Counsel, I wonder whether it would be possible to read into the record the exchange of telegrams between myself and the committee in connection with the witness's testimony. I would like to have it appear in the record.
>
> The Chairman: We will decide whether it will be made a part of the record when the executive session is held. Go ahead.
>
> Mr. Rabinowitz: Mr. Chairman, I sent the telegrams because I wanted them to appear. I do not care whether they appear publicly or not. I do want it to appear that that exchange of telegrams occurred. I did not do it just to increase the revenue of the telegram company.
>
> The Chairman: Well, whatever the reason was, whether it has been stated or otherwise, it will be considered in executive session.
>
> Mr. Rabinowitz: May I state—
>
> The Chairman: Do not bother. You know the privileges given you by this committee. You have appeared before it often enough. You know as well as anybody.
>
> Go ahead, Mr. Tavenner" (Govt. Ex. 2, R. 126).

Petitioner answered questions as to his name and address but refused to answer a series of questions as to his political activity, his educational background, his employment and his union activities. Four of these questions were made the subject of his indictment. They are:

> Count 1. Mr. Yellin, where did you reside prior to September, 1957?

Count 2. Will you tell the Committee, please, whether or not incidents came to your attention of the colonization of the steel unions by the Communist Party at any time prior to September, 1957?

Count 3. Where you a member of the Communist Party on the 23rd of June, 1949, which is the date of application filed in your name for employment in Gary?

Count 4. Will you tell the Committee whether or not in 1957 there were present in any of the steel unions at Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party? (R. 1-3)

Petitioner was never allowed to make an uninterrupted statement of the reasons for his refusal to answer. Among the reasons he gave were that the questions constituted an unconstitutional interference with his freedom of speech, belief and association; that he could not be required to answer the questions under the decisions of this Court in *Watkins* v. *United States*, 354 U. S. 178, and *Sweezy* v. *New Hampshire*, 354 U. S. 234; that the resolution creating the Committee was unconstitutionally vague; that there was no proper legislative purpose to the inquiry and that the questions asked him lacked pertinency. He did not rely on the Fifth Amendment (Govt. Ex. 2, R. 127-131).

Thereafter, petitioner was cited by the House for contempt (R. 12). He was not indicted until a few days after the Supreme Court had decided *Barenblatt* v. *United States*, 360 U. S. 109, in June 1959 (R. 1).

Petitioner came on for trial on March 6, 1960. The only witness called by the Government was Mr. Tavenner. He testified as to the alleged subject under inquiry, referring to the opening statement by Mr. Walter (R. 17).

He further testified that the Committee had previously held hearings on the same subject in Baltimore and Youngstown (R. 18). The testimony of Lautner was introduced (R. 30; Govt. Ex. 15) and Tavenner also identified a transcript of petitioner's testimony.

On cross-examination Mr. Tavenner identified the telegrams above referred to (R. 37). His attention was also called to Rule XI(m) of the House of Representatives, and Rule IV-A of the Rules of the Committee (R. 38, 43). The House Rule, he said, had been interpreted as providing protection only for persons who might be named by the witness, but he admitted that the Committee Rule IV-A (R. 43) was intended for the protection of the witness himself (R. 41, 44). He said he knew of no action taken by the Committee on the request for an executive session, and that he recalled no conference with the Chairman with respect to the request (R. 38, 44). Although the telegram had been addressed to him, it had been answered by Mr. Arens, staff director of the Committee, without his knowledge and before he even knew the telegram had been sent (R. 40). He did not know what authority Mr. Arens had to pass on such a request (R. 40), though he had been counsel for the Committee since May 1, 1949 (R. 15, 44). Mr. Tavenner wasn't sure that he had even seen the telegram sent by petitioner's counsel before the hearings began. He was, of course, at the hearing in Gary when counsel attempted to introduce the exchange of telegrams into the committee record (R. 44). That may have been the first information he had about the telegrams (R. 44).

He further stated that the normal practice of the Committee in conducting a hearing is to interview prospective witnesses "if there is any chance in the world of obtaining cooperation from them." The Committee made no effort to interview petitioner (R. 53).

While repeating that he had known of no request for an executive session before the hearing, he would not have recommended an executive session even if he had received such a request "because we knew that he was a member of the Communist Party and he was in a position to give the Committee information, if he wanted to" (R. 62).

Mr. Tavenner stated that the Committee had investigated "infiltration by the Communist Party into basic industry" in Buffalo, Flint, Colorado, New Haven, Baltimore, St. Louis, North Carolina, Youngstown and New Orleans, all prior to the hearing at which petitioner testified (R. 44-47, 50). At the time petitioner testified the Committee had sworn testimony as to most of the questions asked of petitioner, and specifically as to the questions which form the basis of Counts 1 and 3 of the indictment (R. 56-60).

The Government then rested. The petitioner called Congressman Walter, Chairman of the Committee. Mr. Walter testified that Mr. Arens had no authority to deny a request for an executive session and that the request should have been sent to him as Chairman of the Committee instead of to Mr. Tavenner as counsel. He said: "I am sure this could not have happened, had you addressed your telegram to me" (R. 69).

Mr. Walter said he did not know of the existence of the telegrams when petitioner's counsel sought to raise the question at the hearings (R. 69). He further testified as follows:

> "Q. Well, weren't you interested in finding out what I was talking about? A. I know what you were talking about. You were talking about a telegram that you say you sent, and it was too late then to raise any question that might have been raised by the telegram.
>
> Q. Why was it too late? Wasn't it possible for the Committee to hear Mr. Yellin in executive session at

that time? A. Well, the Committee already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable, because the investigator—and I might say it was Mr. Collins, a former F.B.I. agent, who developed this entire matter, and we were willing to accept his story with respect to the proposed testimony.

* * * * *

Q. Well, what conclusions did you draw from the report of Mr. Collins, which you have just related? A. We concluded that this would be a fine witness for the Committee in support of proposed legislation having to do with colonization, and, two, having to do with the protection of our defense efforts. And it is always worth a chance that somebody will testify.

Q. But it wasn't worth the chance of calling him in executive session, to see what his position would have been? A. I am sure that had you communicated this whole matter to the Committee before we left Washington, so that we could have given it due consideration—we would have, and also do—we might have a different situation today" (R. 69-70).

Although Mr. Walter said, at the hearing in Gary, that he would consider, in executive session, whether or not to put the telegrams into the record, Mr. Tavenner said he didn't know that the matter ever had been taken up, and said, "I believe I would know, if it had been" (R. 63, 71, 72). Mr. Walter said flatly that the subject had been considered in executive session, but without even reading the telegrams, (R. 72). There was no committee minute on the subject (R. 72) and the fact that petitioner had requested

an executive session hence was not called to the attention of the House when it voted to cite petitioner (Govt. Ex. 2; R. 126-142). Mr. Walter dismissed the entire matter as follows:

> "* * * I think the impression I got was that there were telegrams that were more or less in the nature of a request to postpone, without grounds, or whatever it was that Mr. Tavenner told me and the other members of the Committee; and I think that we were just not impressed by it" (R. 73).

He further stated that the only circumstances under which the Committee has executive sessions is

> "* * * where the Committee is fearful lest a witness will mention the name of somebody against whom there is no sworn testimony, and in order to prevent the name of somebody being mentioned in public that we are not sure has been active in the conspiracy" (R. 82).

Mr. Walter gave other testimony concerning the work of the Committee. He defined the expression "un-American propaganda activities" as used in Rule XI of the Rules of the House as "any activity that is inimical to the best interests of the United States" (R. 74).

Petitioner then offered certain testimony by Professor Thomas I. Emerson as an expert witness on the subject of the balancing of "the competing private and public interests at stake" in the circumstances of this case. *Barenblatt* v. *United States*, 360 U. S. 109, 126. The Court rejected the offer of proof, but it appears in full in the record at R. 93-115.

After the petitioner rested, the Court found him guilty on all four counts, sentencing him to year in jail and $250 fine (R. 116).

Aftermath

At the time Yellin testified before the Committee he was a senior in the Engineering School at the University of Colorado. He graduated with an excellent record and received a fellowship grant at the University of Illinois in mechanical engineering for the academic year 1959-1960. Upon his conviction he was suspended for twelve days by the University of Illinois but was reinstated after a hearing before a faculty committee. In March, 1961, he received a National Science Foundation Graduate Fellowship as well as a loan-grant from the Ford Foundation, without which it would have been impossible for him to continue his graduate work. At the end of June, 1961, after a petition for certiorari had been filed in this Court, one of the members of the Committee discovered the fact of the National Science Foundation grant and made a number of speeches on the subject, including some in Congress. The grant was immediately revoked. See New York Times, June 10, 1961, p. 9; June 14, 1961, p. 38; June 16, 1961, p. 13; June 17, 1961, p. 19; June 22, 1961, p. 6; June 26, 1961, p. 18; Congressional Record, June 8, 1961, p. 9123; June 21, 1961, p. 10161.

SUMMARY OF ARGUMENT

I.

In *Barenblatt* v. *United States*, this Court held that "where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown". The instant case presents questions involving the application of the "balancing" doctrine in two respects: First, the testimony which the Committee sought

to elicit from the petitioner was partly cumulative and partly merely corroborative of sworn testimony already in the possession of the Committee. Hence, the public interest in securing such trivial information could not outweigh the substantial public and private interests protected by the First Amendment. Second, the District Court erred in refusing to accept expert testimony offered to establish that the basic premise upon which the Committee seeks to justify its interrogation, namely, that there is a danger to internal security which justifies interference with First Amendment rights, is not supported in fact. Under the circumstances shown by this record, the issue should be resolved by a determination that the First Amendment rights asserted by the petitioner are sufficient to bar governmental interrogation.

II.

The Committee, like Congress itself, is bound by its rules and the rules of the House. Petitioner is entitled to a good faith application of those rules to him. He was therefore entitled to be heard in executive session because his case clearly comes within the provisions of Rule IV-A of the Committee rules or, at the very least, he was entitled to a good faith consideration by the Committee of his right to an executive hearing. He did not receive either an executive hearing or good faith consideration of his request for the same.

III.

Rule XI of the Rules of the House, read in conjunction with 2 U. S. C. §192, is too vague to support a criminal conviction. The meaning attributed to it by this Court in the *Barenblatt* case can be derived from the language of the rule only through extensive investigation into legislative history. Such an investigation is not justified in a criminal

prosecution. The Fifth Amendment requires that a criminal statute, to support a conviction, must be clear on its face.

IV.

The questions contained in Counts 2 and 4 of the indictment were so vague as to be in violation of the Sixth Amendment. The word "colonize" as used in those questions is indefinite and unclear.

V.

The powers exercised by the Committee are outside its jurisdiction and in violation of the First Amendment to the Constitution.

This point is not briefed herein since it appears to be in conflict with the decisions of this Court in the *Barenblatt*, *Braden* and *Wilkinson* cases, but petitioner does not wish to be understood to have acquiesced in those decisions without, at least, this note of protest.

POINT I

In the Circumstances Shown Here Petitioner's Interest in the Protection of His First Amendment Rights, and His Right of Privacy, and the Public Interest in Both Outweighed the Public Interest in Securing Answers to the Questions Which Were the Subject of the Indictment.

We think this Court made a serious error when it said in *Barenblatt* v. *United States*, 360 U. S. 109, 126:

> "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."

We suggest that this was a mistake for two reasons. Fundamentally it reduces the force and significance of those basic rights protected by the First Amendment which are essential to the preservation of our democracy (see dissenting opinions in *Barenblatt* v. *United States*, *supra*, at page 134; *Wilkinson* v. *United States*, 365 U. S. 399, 415; and *Braden* v. *United States*, 365 U. S. 431, 438). In addition, the Court has set up a standard of criminal liability which is difficult, if not impossible, to apply and which adds immeasurably to the vagueness which is inherent in the resolution which defines the Committee's jurisdiction. See *Watkins* v. *United States*, 354 U. S. 178 at 202.

However, this Court has made its decision, and is therefore confronted with the task of defining and exploring the "balancing concept" which has been the subject of so much discussion in the past few years. See dissenting opinions cited above; also *Konigsberg* v. *California*, 366 U. S. 36, 56; *Bates* v. *Little Rock*, 361 U. S. 516 and many other cases. Also, Kalven: Mr. Alexander Meiklejohn and the Barenblatt Opinion, 27 Univ. of Chicago L. Rev. 314; Kalven and Steffen: The Bar Admission Cases, 21 Law In Transition 155, 173; Charles Black: Mr. Justice Black, The Supreme Court and the Bill of Rights, 222 Harpers Magazine 63 (February, 1961); Meiklejohn, Political Freedom (1960). This is a very difficult task but must be undertaken unless the process of balancing is to become a cover-up for arbitrary and *ad hoc* decisions which would be intolerable in any case but even more so in a criminal prosecution.

The questions raised by the *Barenblatt* formula are many and most of the answers await illumination by this Court. We are required to balance competing rights and interests. The private rights involved can be reasonably well defined

—it is the right to remain silent of which Mr. Justice Jackson spoke so eloquently in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 633—the right to hold unpopular and even hateful political, religious or social views without proclaiming them to the public under threat of punishment for crime. All will agree—in fact all *have* agreed—that such private interests are weighty (see, for example, *Watkins* at p. 196 ff; *Shelton* v. *Tucker*, 364 U. S. 479, 486).

The public interests are not so easy to define, but they would seem to fall, some on one side and some on the other side of the scale.

On the one side, in favor of the broad right of governmental interrogation, is the vital interest to protect public order against subversion and illegal or violent overthrow; on the other is the public interest in keeping open channels of free discussion so that our democracy may live.

Having once determined on the scope of private rights and public interests to be weighed in this balance, the next question is who performs this weighing operation and how. Clearly the balance must be struck by the court rather than the legislature because otherwise the determination of the legislature to invade private rights would be decisive, and we know that this cannot be true. *Bates* v. *City of Little Rock*, 361 U. S. 516; *National Association For The Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Scull* v. *Virginia*, 359 U. S. 344; *Shelton* v. *Tucker*, 364 U. S. 479.

But this leaves open two critical issues: (1) how does the court get the information which would enable it to balance private rights and public interests, and (2) what did this Court mean when it directed that the balance was to be related to "the particular circumstance shown." Did the

Court mean that in the circumstances in which we now find ourselves, in this decade of the Twentieth Century in the United States, free speech rights asserted by alleged Communists *never* outbalance the Government's right to interrogate (as compared, for example, to the constitutional rights to equal treatment asserted by Negroes which, evidently, often outweigh governmental interrogation by southern states)? Or did this Court mean that the trial court would hear evidence on the circumstances shown in each case and would, on that evidence, decide which way the balance must fall?

This case was tried shortly after the decision in *Barenblatt* had made it clear that the rights which we thought were protected by *Watkins* and *Sweezy* were in fact not protected at all. So petitioner and counsel addressed themselves to the problem of "balancing" in accordance with the opinion of the Court in *Barenblatt*. We argued below, and argue here, that in our system of laws, guilt is individual and each defendant is entitled to be tried on the record made in his own individual case. It follows that the trial court must, in each case, weigh the evidence separately. Among the elements to be considered in determining guilt is the balance, "in the particular circumstances shown," that this Court has ordered to be struck between the various rights and interests at stake. Therefore we offered evidence, first, that in view of the information already in the possession of Congress, the interest of Congress in getting the repetitive information it sought from petitioner was trivial and could not outweigh the public interest and private rights on the other side of the scale, and, second, that the general political situation was such that the information sought by the Committee was not important.

Both courts below disposed of this argument with the remark that:

"It is not a question of fact as to what elements go to make up the balance of interests, public and private, but a legal matter which is within the province of the court to decide" (Court of Appeals decision, 287 F. 2d 292, at 298).

We respectfully suggest that this holding is an evasion of the issue. The question remains, how does the Court decide? Does each Judge make this decision on the basis of his personal political views as to the relative importance of things in this changing world so that the standard is as variable as the Chancellor's foot, or does the Court act in what we have all understood to be a judicial manner, namely, upon the consideration of objective facts presented to it on the basis of a record made in open court with full opportunity on the part of all parties to present these facts and have them determined by the tribunal?

A.

The testimony which the petitioner was called upon to give was at most cumulative and the governmental interest in securing it was trivial.

This is not the first time there has been a congressional investigation of communist "infiltration" in basic industry. As Committee's counsel testified, similar investigations were carried on in Buffalo, Flint, Denver, New Haven, Baltimore, St. Louis, North Carolina, Youngstown and New Orleans, all prior to the hearing in which petitioner testified (R. 44-47, 50).[1] The hearings in these other places were not

[1] Hearings before the Committee on Un-American Activities, House of Representatives, as follows:

casual or preliminary to the Gary hearing but occupied literally thousands of pages of testimony and involved the calling of well over a hundred witnesses. The testimony in many of these hearings differed in no material respect from the testimony given at Gary. The Buffalo hearing and the hearings in Baltimore were almost carbon copies of those in Gary. The testimony sought in the Gary hearing was entirely cumulative.[2] It could not have added any

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83rd Cong.

Investigation of Communist Activities in the State of Michigan (Parts VIII through X, Flint), pp. 5487-5751.

84th Cong.

Investigation of Communist Activities in the Rocky Mountain Area (Parts I and II), pp. 473-4301.

Investigation of Communist Activities in the St. Louis, Missouri Area (Parts I through IV), pp. 4721-5084.

Investigation of Communist Activities in the Youngstown and Northern Ohio Areas, pp. 5877-6038.

85th Cong.

Investigation of Communist Activities in the New Orleans, Louisiana Area, pp. 119-178.

Investigation of Communist Activities in the Baltimore, Maryland Area (Parts I and II), pp. 391-1086.

Investigation of Communist Activities in the Buffalo, New York Area (Parts I and II), pp. 1601-1808.

[2] The hearings themselves are replete with admissions by Committee counsel and members of the Congress that the testimony was cumulative. Thus Mr. Tavenner at the St. Louis hearings pointed out that the Committee first heard evidence of the "colonization" program from the witness Philbrick. He further pointed out that the Committee, at the Flint hearings, was able to get extensive proof of the colonization procedures. Then Mr. Scherer commented on the testimony at Flint and Mr. Tavenner mentioned that similar testimony had been secured at the Rocky Mountain Area hearings (see Hearings, 84th Cong., p. 4773).

Similar examples could easily be drawn from other hearings. In fact, at the Gary hearing Mr. Tavenner reminded the Subcommittee "that we received a considerable amount of evidence at Flint, Michigan, of probably eight or ten instances of colonization of the exact type that you describe." Mr. Walter commented on similar cases in North Carolina. Mr. Tavenner followed with a reference to the testimony at Colorado University (R. 166, 167).

information of significance to the tremendous amount of testimony already in the possession of the Committee.

An examination of the specific questions which are the subject of the indictment herein makes this even more clear. Count 1 relates to petitioner's residence prior to September, 1957. The Committee had that information not only from other witnesses on the subject but from the employment record of petitioner. Mr. Tavenner testified:

> "Q. Did you have any information as to where he resided prior to September 1957? A. Yes. . . .
>
> Q. And you had in your files work records from, I suppose, his employer indicating that he had worked in Gary until some time . . . A. Our investigator had procured information as to his application for employment and the fact that he was employed and had been.
>
> Q. And that he lived in Gary prior to September, 1957? A. That's right" (R. 59, 60).

The same is true about Count 3 in the indictment. There the Committee was inquiring as to the witness' membership in the Communist Party nine years before he testified. It had in its files extensive information on that very subject, and Mr. Tavenner testified that he had the sworn testimony of witnesses at previous hearings (R. 58). What possible difference could it have made to the Congress of the United States whether petitioner was or was not a member of the Communist Party in 1949 while a student at the University of Michigan? Assuming that the subject was pertinent, what further information could it get for legislative purposes aside from the information it already had. It was not engaged in a judicial proceeding in which it was required to make a finding on disputed facts. It was engaged in a legislative proceeding; there was no dispute as to the facts and the answer to this question could not conceivably have influenced Congress in determining what sort of legislation to enact.

The questions contained in Counts 2 and 4 are not only so vague that they cannot properly be the subject of an indictment (see Point IV below), but, as already noted, they, too, constitute cumulative evidence. See, as one of many examples, the testimony of Turoff and Ingerman, Buffalo hearing, 85 Cong. 1st Sess., pages 1568-1599; 1650-1666.

Thus, none of the testimony sought by the questions which are the subject of the indictment was intended to elicit information which Congress needed. The purpose, of course, was actually one which has always been the purpose of the Committee, namely, to expose alleged party members with all of the consequences that the Court noted in the *Watkins* decision.

Against this there must be set those basic constitutional rights which were infringed by this examination. Both *Watkins* and *Barenblatt* make it clear that a Congressional Committtee in conducting investigations into a witness' political activities and associations, is infringing on his first amendment rights and that such infringement is not to be permitted in the absence of a substantial public interest. No such substantial public interest can be found in the present case.

B.

THE COURT ERRED IN EXCLUDING FROM THE RECORD THE PROFFERED TESTIMONY OF PROFESSOR EMERSON, OFFERED ON THE ISSUE OF THE BALANCING OF PUBLIC INTEREST.

If the Court, in its enigmatic language in *Barenblatt*, meant to refer, not to the specific circumstances surrounding a particular hearing, but rather to a general political situation which is presumed to exist, we must, difficult

though it may be; address ourselves to this general political situation.

It should be noted first, that this Court does in fact balance interests separately in each case. Thus in *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516, and *Shelton* v. *Tucker*, 364 U. S. 479, this Court separately considered the facts in each case. And, after balancing them, it came to the conclusion that the rights of the individuals involved outweighed the right of the state in securing information which impinged on First and Fourteenth Amendment rights. The same procedure should have been followed here but it was not.

In the *Barenblatt* case, the Court (at page 128 et seq.) made certain "findings" with respect to the alleged threat of communism to the United States. We assume that those findings were made on the basis of the record in that case, together with additional facts of which the Court took judicial notice. In the instant case there are no facts in the record for the basis on which any finding could be made that communism constitutes a sufficient threat to the United States to justify interference with first amendment rights which, it must be generally conceded, exist here. So we must assume that the District Court took judicial notice of the facts it was required to find under the *Barenblatt* decision, namely, that in balancing the competed rights and public interests at stake in these circumstances, governmental interrogation was permitted.

Generally speaking, a Court may take judicial notice of facts which are "common knowledge" but the doctrine of judicial notice can never constitutionally be utilized to bar evidence seeking to contradict such "common knowledge." Testimony is always admissible on any factual issue before the Court. As the Supreme Court said in *Ohio Bell Telephone Co.* v. *The Public Utilities Commission of Ohio*, 301 U. S. 292, 301:

"Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence, Wigmore, Evidence §2567; 1 Greenleaf, Evidence, 16 Ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid.*"

In *Grand Opera Co.* v. *Twentieth Century-Fox Film Corp.*, 235 Fed. 2d 303, 307 (C. A. 7, 1956), the Court said:

"Judicial notice is merely a conventional method of taking evidence to establish facts."

To the same effect, see *In re Bowling Green Milling Co.*, 132 Fed. 2d 373 (C. C. A. 6, 1942); *United States* v. *Aluminum Co. of America*, 148 Fed. 2d 416 (C. C. A. 2, 1945).

In order to establish his contention, that in the circumstances shown in this case private and public interests in protecting freedom of speech outweighed the public interest in permitting interrogation, petitioner offered expert testimony on the subject, it being difficult to conceive of any alternative way in which proof addressed to this issue could be presented in a court. Hence, expert testimony of Professor Thomas I. Emerson, Professor of Law at Yale University was prepared in writing and was submitted to to the Court at the trial for a ruling as to admissibility. The Court refused to accept the tesfimony, but the offer of proof is a part of the record and appears at R. 93-115. This testimony may be summarized as follows:

The witness first qualified himself as an expert, setting forth his professional background since his graduation from Law School in 1931. After extensive and widespread experience in government service he became a member of the faculty at Yale Law School in September, 1946. Since that

time his major field of research has been public law and within that general area, political and civil rights. He has written a two volume work on the subject, a second edition of which was published in 1958, and since 1946 he has maintained an extensive file of material on this subject. In the academic year 1953-1954 he studied civil liberties in Great Britain; for the academic year 1960-61 he received under a Fellowship from the Ford Foundation to study the legal foundations of the right of political expression. He is in close touch with other academic communities through contacts with faculty members, students and other organizations within various educational institutions. He is fully familiar with the work of the House Committee on Un-American Activities (R. 93-97).

Professor Emerson then outlined in considerable detail legislation already in existence relating to the protection of internal security in the United States. He discussed the social conditions which might give rise to political and social unrest, and the strength of the Communist Party, the organization against which this Committee has directed most of its activities. He pointed out that in political activity, in industry, agriculture, labor, religion, education and in other areas of American life the Communist Party has substantially no influence. He further noted that the Committee had already collected a great deal of information on the very subject under investigation at Gary, at hearings held in New Orleans, Buffalo, North Carolina, Denver, St. Louis, New Haven and Youngstown (R. 100-108).

Professor Emerson then turned "to the other side of the scales" and considered the interest of the individual and of society in freedom of speech. He discussed the interests of the individual in his right of expression and in his right of silence and the nature of the interest of society in freedom of political expression in a democratic society. Such

a right of expression is, he pointed out, necessary to a healthy functioning of society. He considered in some detail the economic and social effects upon the witness called before the Committee as well as the effect on his right of association (R. 108-114).

In conclusion Professor Emerson stated it as his opinion

> "that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society" (R. 115).

The issue here is not the merits of Professor Emerson's testimony or its weight, but only its admissibility. It seems clear that if the balancing concept established by the Court in the *Barenblatt*, *NAACP*, and *Shelton* cases, *supra*, is to be applied in a way that will protect the constitutional liberties of petitioner and others similarly situated, testimony on the subject must be admissible. Otherwise, there is no way in which the Court can balance those interests save by its own speculation.

POINT II

The Committee Violated Its Own Rules in Failing to Consider Petitioner's Request for an Executive Session.

Over the past generation there has been much criticism of the way in which various congressional committees, and particularly this Committee, have conducted their affairs. It has been widely charged that the rights of witnesses are not sufficiently protected, and that the Committee acts in an irresponsible fashion. See *Barsky* v. *United States*, 167 F. 2d 241, 250 (C.A.D.C. 1948).

In 1955, in response to this criticism, the House of Representatives adopted a series of amendments to its Rules designed to protect the rights of witnesses. These rules, together with the rules of each separate committee, constitute the charter of authority of the committees and prescribe the limitations on their authority. *Barenblatt* v. *United States*, 360 U. S. 109, 117.

Just as an executive or administrative agency or indeed a court may not proceed in violation of its own rules (*Service* v. *Dulles*, 354 U. S. 363; *Peters* v. *Hobby*, 349 U. S. 331), so Congress may not proceed without regard to its rules. (*Christoffel* v. *United States*, 338 U. S. 84; *United States* v. *Ballin*, 144 U. S. 1; *United States* v. *Smith*, 286 U. S. 6.)

It is clear from the rules themselves that they are intended for the protection of witnesses. Thus, for example, Rule XI, Paragraph 26(j) provides:

> "A copy of the committee rules, if any, and paragraph 36 of Rule XI of the House of Representatives shall be made available to the witness."

There would be no point in providing that witnesses are to be given a copy of the rules unless they have rights which arise therefrom.

Rule IV-A of the Rules of Procedure of the Committee provides that if a majority of the Committee believes that interrogation of a witness might unjustly injure his reputation, the Committee shall interrogate him in executive session (R. 43). It would seem that this rule would require the Committee to consider, as to each witness appearing before it, whether an executive session was in fact desirable for the purpose of the protection of the witness.*

In fact, the Committee followed no such procedure. The standard used by the Committee in determining whether or not to call a witness in executive session, or even to interview him privately before calling him in public session, was set forth by Mr. Tavenner; normal practice, he said, is "to interview people if there is any chance in the world of obtaining cooperation from them" (S.M. 113).

Congressman Walter likewise set forth the standards applied by the Committee in determining whether to grant an executive session. See his testimony at R. 70. He first said that:

> "The rule with respect to an executive session was not applicable because . . . the man was a known communist; that he had been active in the international conspiracy, and that he had deceived his employer; and, furthermore, he came within the category of those people those people that we were experiencing a great deal of difficulty in finding out about with respect to the colonization."

* Rule XI, Paragraph 26 (m) of the House itself contains similar provisions, but Mr. Tavenner said that in the Committee's opinion it was not applicable here (R. 41). We disagree, but admittedly Rule IV-A of the Committee's Rules does apply (R. 44).

Mr. Walter was further questioned as to the considerations the Committee uses in determining whether to hold executive sessions. He answered:

> "This is usually done when the Committee is fearful lest the witness will mention the name of somebody against whom there is no sworn testimony; and in order to prevent the name of somebody being mentioned in public that we are not sure has been active in the conspiracy . . . we have an executive hearing" (R. 82).

It is clear from both the testimony of Mr. Tavenner and Mr. Walter that the Committee, in determining whether to have executive sessions, ignored § IV-A of its own rules which, as is noted above, provides for an executive session when public interrogation of a witness might unjustly injure his reputation.

Nor was this the full extent to which the Committee disregarded its own rules. Petitioner here specifically requested an executive session precisely because he wished to avoid the unfavorable publicity to him which would result if he were called in public session (Deft's Exh. 1). The Committee failed even to consider the request. Counsel for petitioner, in a communication addressed to counsel for the Committee, requested an executive session. This request was denied by the Staff Director who, it was later claimed, had no authority to act. Whether or not he had authority is not important for the request was ignored even when it was renewed at the time of the hearing (Govt. Exh. 2, R. 126).

Mr. Walter conceded that the events which followed, culminating in the contempt citation, the indictment and the trial, might not have eventuated, had the Committee considered the request for an executive session. Thus he

argued that the request for an executive session should have been sent to him instead of to counsel for the Committee and went on to remark

> "I am sure this could not have happened had you addressed your telegram to me" (R. 69).

Subsequently he repeated that if he had known of the request for an executive session so that the Committee could have given it due consideration "we might have a different situation today" (R. 70).

Mr. Walter's contention that the telegram should have been sent to him instead of counsel hardly excuses the failure of the Committee to adhere to its own regulations or to apply the standards that are therein set forth. The telegram was sent to the Committee four days before the hearing and the request for an executive session was denied by an authoritative representative of the Committee within a few hours. Counsel was prevented from renewing the request at the hearing itself by the action of Congressman Walter. If it is true, as Congressman Walter suggested, that this was all a misunderstanding, that Mr. Arens did not have the authority to deny the request for an executive session, that he did not understand what petitioner's counsel was trying to say at the hearing, and that if the matter had been presented to the Committee the citation for contempt might not have followed; then certainly common fairness requires that the indictment should be dismissed.

It cannot even be contended here that there was a *pro forma* compliance with the rules of the Committee; certainly there was no effort to apply them impartially and in good faith. Yet a good faith compliance with the rules is exactly what petitioner was entitled to (*United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260).

POINT III

Rule XI Read in Conjunction With 2 U. S. C. § 192 Is Too Vague to Support a Criminal Conviction.

House Rule XI read in conjunction with 2 U. S. C. 192 must be treated as a criminal statute. *Sacher* v. *United States*, 356 U. S. 567, 577; *Watkins* v. *United States*, *supra*, at 208. Therefore, to be valid, Rule XI must establish a standard of conduct that meets the test of *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507 and *Raley* v. *Ohio*, 360 U. S. 423. Quite aside from petitioner's right to rely on the decision in *Watkins* which was argued before this Court on behalf of the petitioner in *Braden* v. *United States*, *supra*, and disposed of by reference to *Sinclair* v. *United States*, 279 U. S. 263, we raise here a due process question going to the uncertainty of the meaning of the criminal statute under which petitioner was convicted. If a criminal statute is uncertain, it cannot support an indictment.

This Court said in the *Raley* case, *supra*, at p. 438:

> "* * * A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions. *United States* v. *Cardiff*, 344 U. S. 174. Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. *Johnson* v. *United States*, 318 U. S. 189, 197. The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the

fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants. We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances" (360 U. S. 423, 438-9).

It is true that the majority in the *Barenblatt* case was able to assign a meaning to the vague language contained in Rule XI. This it did after a study of the twenty year history of the Committee in the course of which reference was made to debates on the original authorizing resolution in the 75th Congress, to seventeen House Reports from the 76th Congress to the 85th and to twenty-three House Resolutions extending over the same period of time. It may be that such an historical survey justifies the conclusion to which the Court came as to the intent of Congress. The difficulty is that we are not here concerned with the intent of Congress, but rather with the guilt or innocence of petitioner who is entitled to read a statute and to base his conduct on a fair interpretation of the words set forth therein.

It is unreasonable to expect that petitioner would understand that the word "un-American" really meant "Communist Party", especially a few months after the Chief Justice of the United States, in an opinion joined in by a majority of this Court, had been unable to define the words. It is unreasonable to expect that petitioner would interpret the words "propaganda activities" as meaning "any activity" (see testimony of Mr. Walter at R. 76).

We know of no case prior to *Barenblatt* in which a court was compelled to rely on legislative history in order to uphold a criminal conviction and we respectfully suggest that to the extent to which the Court was compelled to rely on such history in the *Barenblatt*, *Braden* and *Wilkinson* cases it did so in clear violation of the most funda-

mental rights guaranteed under the due process clause. If a statute is clear on its face (and no one can reasonably contend that this statute is clear), there is no occasion for resort to legislative history; if a state is unclear on its face it cannot support a criminal conviction.

We are aware of the fact that the contention we are here making was inherent in the record in *Barenblatt*, *Braden* and *Wilkinson* and it seems to have been argued in the *Braden* case. However, it was not considered in any of the three opinions.

Assuming that the Committee had the jurisdiction it claims (as the Court found in *Barenblatt*) and assuming further that the intent of the defendant in a §192 case is not relevant, as the Court held in *Sinclair* and *Braden*, the constitutional objection remains that the statute is unclear and that the tests set forth by this Court in the earlier cases, cited above, cannot be met.

POINT IV

The Questions Contained in Counts 2 and 4 Were Too Vague to Support an Indictment.

The question which forms the basis of Count 2 of the indictment reads as follows:

> "Will you tell the Committee, please, whether or not incidents came to your attention of the colonization of the steel unions in Gary by the Communist Party at any time prior to September 1957?"

The question which forms the basis of Count 4 of the indictment reads as follows:

> "Will you tell the Committee, whether or not in 1957 there were present in any of the steel unions at

Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party?"

The terminology employed in both of these questions is so vague that it cannot meet the requirements of the Sixth Amendment, that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation. See also Rule 7c, Federal Rules of Criminal Procedure, 18 U. S. C.

The Government urged that the appellant understood the meaning of the word "colonize" as used in the questions put to him. This answer, we respectfully request, shows a misconception of the nature of petitioner's argument. The issue was not whether he understood the question, but whether the indictment met the requirements of the Sixth Amendment and of Rule 7c of the Rules of Criminal Procedure. *O'Connor* v. *United States*, 240 Fed. 2d 404, 405; *United States* v. *Lattimore*, 215 Fed. 2d 847.

In both of those cases, the Court held that the questions set forth in the indictment must be definite and clear if the statutory and constitutional requirements are to be met. It was not suggested in either opinion that the defendant did not understand the meaning of the questions put to him, or that such understanding on his part would have been relevant.

Indeed, in the *Lattimore* case, the indictment was dismissed prior to trial. Similar action was taken recently in the District of Columbia where Judge Letts in *United States* v. *Grumman*, Criminal No. 752-58, dismissed several counts of an indictment prior to trial because the indictment used the word, "communist," and the defendant argued successfully that that word was too vague to meet statutory and constitutional requirements.

As in this case, the Government argued, in *Grumman*, that the context in which the question was argued made it clear to the witness that the word, "communist," was synonymous with "Communist Party," but Judge Letts held otherwise.

Under these circumstances, it is respectfully suggested that the 2nd and 4th Counts should be dismissed.

As we noted above, the questions which form the basis of Counts 1 and 3 called for information in the possession of the Committee and hence even if they had slight pertinency were of such trivial importance that they cannot be said to outweigh petitioner's constitutional rights. With the disposition of Counts 2 and 4 as suggested above, the indictment must fall.

POINT V

The Committee Acted in Violation of the First Amendment to the Constitution and in Excess of Its Authority.

In the *Barenblatt, Braden* and *Watkins* cases, to say nothing of the other cases argued at this Term of the Court, the petitioners generally have contended that there was no genuine legislative purpose to the investigation carried on by the Committee, and that the Committee in general was engaged in activities which violated the First Amendment to the Constitution. This Court has on several occasions now by closely divided vote rejected these arguments and we shall therefore not set them forth again. We mention them here merely as a reminder to the Court that in the opinion of many this Committee constitutes a basic threat to American freedom and that it has over a period of a generation functioned in violation of the constitutional rights of those who have been called before it.

Conclusion

Petitioner's conviction should be reversed.

Respectfully submitted,

RABINOWITZ & BOUDIN
25 Broad Street
New York 4, N. Y.

WECHSLER & DREYFUS
504 Broadway
Gary, Indiana

Attorneys for Petitioner

VICTOR RABINOWITZ
LEONARD B. BOUDIN
Of Counsel